APR 6 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1498

GARY REGIUS LEE, *Petitioner*

Against

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The Court of Criminal Appeals
Of The State of Texas

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, GARY REGIUS LEE, prays that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Texas of December 19, 1973. See 503 S.W.2d 244.

OPINION BELOW

The opinion delivered by the Court of Criminal Appeals of the State of Texas in this cause is reported at 503 S.W.2d 244 and is appended to this petition. See Appendix "A". This Petition for Writ of Certiorari is from an affirmance by the Court of Criminal Appeals

of Texas from a conviction wherein Petitioner was Indicted, tried and convicted on a plea of guilty for the non-capital felony criminal offense of murder with malice aforethought. See Art. 1256, Vernon's Annotated Texas Penal Code, hereinafter referred to as V.A.T.P.C., prior to amendment.[1] See also Appendix "G", concerning the statute involved in this cause. Petitioner appealed his conviction but same, as noted, was affirmed by the Court of Criminal Appeals.

Under State law, it is conceded the admonishments given by the trial judge were sufficient. See Art. 26.13, Vernon's Annotated Texas Code of Criminal Procedure, and Appendix "F". However, this Petition for Writ of Certiorari is dedicated to the proposition that the admonishments are not sufficient under the dictates and mandates of the decisions of this Honorable Court set forth in *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, (1969).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3) and Rule 19 (1), Revised Rules of the Supreme Court of the United States of America.

QUESTION PRESENTED

Whether Petitioner was deprived of due process of law by the Texas procedure, in accepting a plea of guilty, which requires only the following admonitions with affirmative replies after the accused is informed of the accu-

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1. The State of Texas, see Acts 1973, 63rd Leg., Chapter 399, Effective January 1, 1974, has enacted in part a New Penal Code.

sation and his right to a trial by jury and the punishment involved:

Q: Are you pleading guilty because you are guilty?
A: Yes, sir.
Q: Are you pleading guilty because of any fear, or by any persuasion, or any delusive hope of pardon causing you to confess your guilt?
A: No, sir.
Q: Are you pleading guilty because of any threats or coercion or because of any promises made to you by anyone?
A: No, sir.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions and statutes involved are set out below. (Appendices "C", "D", "E", "F", and "G", pp. 13-17).

STATEMENT OF FACTS

The facts of this Cause are brief. On January 8, 1973, Petitioner was brought before the trial court for trial, together with two other jointly indicted defendants, all of whom were represented by the same attorney. All entered pleas of guilty to the Indictment alleging that they did with malice aforethought kill one Albert Cook by striking him with their fists and by kicking him with their feet. After accepting the pleas of guilty, hearing evidence pertaining to the punishment to be assessed, the trial court assessed the punishment for each of the Defendants at ten (10) years confinement in the Texas Department of Corrections. Thereafter, Petitioner alone appealed his conviction, but same was affirmed by the Court of Appeals

of Texas. See 503 S.W.2d 244. Petitioner was denied leave to file his Motion for Rehearing. Thus, Petitioner has exhausted all known State remedies available to him on direct appeal. See Appendix "B".

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Article 26.13, Vernon's Annotated Texas Code of Criminal Procedure provides:

> If the defendant pleads guilty, or enters a plea of nolo contendere he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is sane, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt.

Article 1.15, Vernon's Annotated Texas Code of Criminal Procedure, which, it is submitted, is not applicable to this Cause, then provided:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless in felony cases less than capital, or in capital cases where the state has waived the death penalty the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the Court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence

to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

DISCUSSION, ARGUMENT AND AUTHORITIES

The Court of Criminal Appeals has held, see *Johnson v. State,* 501 S.W.2d 306, for example, that if the admonishments meet the requirements of Art. 26.13, supra, then *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), is satisfied.

The question, as presented here, is whether or not the admonition by the trial court to the Petitioner in this Cause was sufficient? In short, is the admonition as set out in *Overton v. State,* 1973, 495 S.W.2d 230, and *Moreno v. State,* 1973, 500 S.W.2d 114, for examples, and here sufficient to meet the requirements of what this Honorable Court said in *McCarthy v. United States,* 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; and *Boykin v. Alabama,* supra?

The members of the Court of Criminal Appeals, it should be pointed out, at least since the spring of 1973, have not always been in agreement as to what constitutes a sufficient admonition under the Texas statute. In fact, the dissenting opinions by Judges Onion and Roberts

are rather strong. In this regard, the Court's attention is directed to the following cases of *Espinosa v. State,* 1973, 493 S.W.2d 172; *Mayes and Ross v. State,* 1973, 494 S.W.2d 914; and *Prudhomme v. State,* 1973, 495 S.W.2d 941.

Thus, as shown by the Texas cases, the State of Texas recognizes *Boykin v. Alabama, supra,* but the question here is whether or not it was applied in this cause as dictated by this Honorable Court.

Petitioner submits that something more than a formulistic three (3) questions with three (3) right answers should be required when an individual is giving up so much. Cf. *Santobello v. New York,* 404 U.S. 257, 30 L. Ed.2d 427, 92 S.Ct. 495 (1971). If there had been searching questions, see *Monroe v. United States,* 1972, Fifth Circuit, 463 F.2d 1032; *Cooks v. United States,* 1972, Fifth Circuit, 461 F.2d 530; *Gilbert v. United States,* 1972, Fifth Circuit, 466 F.2d 533; and *United States v. Landry,* 1972, Ninth Circuit, 463 F.2d 253, and if, at the conclusion thereof, there was no question concerning the admonitions given, the showing that Petitioner sufficiently understood the nature of the charge made against him, the showing that the trial court made a factual determination, independently of the allegations contained in the Indictment, that a factual basis existed for the Petitioner's acknowledgment of his guilt, the showing that Petitioner sufficiently understood any and all defenses available to him, the showing that Petitioner sufficiently understood any and all punishments permissible under the law and the showing that Petitioner sufficiently understood any and all issues of mitigation permissible under the law then, of course, the issues presented here would be moot.

However, that is the point. The above searching questions did not occur and were not made. Something more than what occurred in this Cause, it is submitted, was mandated by this Honorable Court in *Boykin v. Alabama, supra;* and *McCarthy v. United States, supra.*

CONCLUSION

Petitioner, therefore, submits this Honorable Court should grant this Application for Writ of Certiorari, and, after doing so, hold that the present Texas procedure concerning the admonitions to be given and the procedure to be followed in accepting a plea of guilty is Constitutionally impermissible and void and, upon doing that, this Cause should be remanded to the Court of Criminal Appeals of Texas to enter an Order reversing its former Judgment and Order this Cause to be remanded for a new trial to the 56th Judicial District of Galveston County, Texas.

Respectfully submitted,

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CERTIFICATE

I, Marvin O. Teague, Attorney for Petitioner, Gary Regius Lee, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, State Supreme Court Building, Austin, Texas, this the _____ day of April, A.D. 1974.

MARVIN O. TEAGUE

APPENDIX "A"

NO. 47,762

GARY REGIUS LEE,
Appellant
v.
THE STATE OF TEXAS,
Appellee

Appeal From GALVESTON COUNTY

OPINION

Appellant along with two co-defendants was convicted for murder, upon a plea of guilty before the court; punishment was assessed at ten years.

Initially appellant challenges the sufficiency of the evidence. The record contains a written, sworn stipulation of evidence and judicial confession executed in open court and admitted into evidence. This is sufficient in itself. See Higginbotham v. State, 497 S.W.2d 299 (1973), and authorities cited therein.

Next appellant contends that he was tried and punished for a criminal offense which no longer exists in this State. He cites Foster v. State, 493 S.W.2d 812; Lucky v. State, 495 S.W.2d 919; and Brazile v. State, 497 S.W.2d 302, for the proposition that Texas has no criminal offense known as "murder with malice aforethought", the single such criminal offense being "murder". The cases relied upon hold that the presence or absence of malice relates only to the punishment. While this is true, it was early recognized that the allegation in the indictment that appellant did "unlawfully and with malice aforethought kill"

the deceased properly charges the offense of murder. See Powell v. State, 21 S.W.2d 728 (1929); Crutchfield v. State, 10 S.W.2d 119 (1928). Indeed, any punishment in excess of five years is illegal unless the indictment alleges that the killing was done with malice aforethought, said element being indispensable for a greater penalty. Swilley v. State, 25 S.W.2d 1098; Gossett v. State, 25 S.W.2d 1105; DePena v. State, 25 S.W.2d 1106; Hunt v. State, 25 S.W.2d 1107; Dunwoody v. State, 25 S.W.2d 1107. We, therefore, overrule appellant's contention that he was tried and punished for a nonexistent offense.

Finally appellant contends that the trial court erred in not withdrawing his plea of guilty. The rule controlling this issue was stated in Reyna v. State, 434 S.W.2d 362, as follows:

> ". . . [E]vidence must go farther than just tending to show a defensive issue, but must reasonably and fairly present such issue before the trial court would be required to withdraw the guilty plea." 434 S.W.2d at 365.

Initially we note the "evidence" to which appellant refers in his brief appears from the record to be a conversation between the judge and the three accused, and not testimony under oath. Aside from this, however, we do not find that the conversation reasonably and fairly presented any such defensive issue as contended in appellant's brief.

In the course of the conversation appellant and his codefendants, young men around twenty years of age, admitted that without provocation they pulled the deceased, a 50 or 60 year-old derelict, from the back of a truck

and proceeded to beat and kick him. The statement that appellant and his co-defendants had been drinking, or that they thought the derelict was trying to attack them cannot by any stretch of the imagination be said to have "reasonably and fairly" presented a defensive issue. Although the better practice may well have been for the trial court to have pursued the preposterous and wholly unbelievable suggestion that they were acting in self-defense with searching questions, and it may well have been justified in rejecting the pleas and requiring these men to face a jury and accept such punishment as they would have received following a full-blown trial, certainly the court was not required to reject appellant's plea on the basis of this record.

The judgment is affirmed.

ODOM, Judge

(Delivered December 19, 1973.)

APPENDIX "B"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS—AUSTIN, TEXAS

I, TOMMY LOWE, Chief Deputy Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 47,762, styled:

GARY REGIUS LEE, Appellant

v.

THE STATE OF TEXAS, Appellee

the judgment of the 56th Judicial District Court of Galveston County, Texas, was affirmed on December 19, 1973, the motion for leave to file appellant's motion for rehearing was denied on January 16, 1974 and on January 18, 1974 the mandate issued.

THEREFORE, with the denying of the motion for leave to file the appellant's motion for rehearing, this cause was disposed of by this, the Court of Criminal Appeals of Texas, on January 16, 1974, and the appellant having exhausted all remedies in said Court the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this the 23rd day of January, A. D. 1974.

TOMMY LOWE
TOMMY LOWE, Chief Deputy Clerk
Court of Criminal Appeals of Texas

APPENDIX "C"

CONSTITUTION OF THE UNITED STATES

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district whereby the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Section 1.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "E"

VERNON'S ANNOTATED TEXAS CODE OF CRIMINAL PROCEDURE

Article 1.15

"No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless in felony cases less than capital, or in capital cases where the state has waived the death penalty the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the Court as the basis of its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the apperance, confrontation, and cross examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause."

APPENDIX "F"

VERNON'S ANNOTATED TEXAS CODE OF CRIMINAL PROCEDURE

Article 26.13

"If the defendant pleads guilty, or enters a plea of nolo contendere he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is sane, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of paron, prompting him to confess his guilt."

APPENDIX "G"

VERNON'S ANNOTATED TEXAS PENAL CODE

Article 1256

"Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing. [O.C. 607; Acts Feb. 12, 1858; 1913, p. 238; 1927, p. 412, ch. 274, § 1.]"